

COPY

IN THE ILLINOIS COMMERCE COMMISSION
527 East Capitol Avenue
Springfield, IL 62701

United Transportation Union –
Illinois Legislative Board,

Petitioner,

v.

Canadian Pacific Railway,

Respondent.

Case No. T04-0082

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DEC 30 2004

Illinois Commerce Commission
RAIL SAFETY SECTION

**RESPONDENT'S
MOTION TO DISMISS**

INTRODUCTION

Respondent Canadian Pacific Railway ("CP Rail") respectfully moves to dismiss the Complaint filed by the United Transportation Union—Illinois Legislative Board ("UTU") for lack of jurisdiction and on mootness grounds pursuant to 83 Ill. Adm. Code 200.190(a). The Illinois Commerce Commission ("Commission") lacks subject matter jurisdiction to address the claims asserted in the Complaint because the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10501 et seq., preempts state remedies and vests exclusive jurisdiction in the federal government for interstate rail matters affecting the facilities of rail carriers. The Commission also lacks jurisdiction since the subject matter is preempted under the Railway Labor Act ("RLA"). Finally, the Complaint should be dismissed because CP Rail has made a number of changes relating to its facilities which render moot the claims asserted in the Complaint.

Accordingly, for all the foregoing reasons, CP Rail moves to dismiss the Complaint in its entirety.

DOCKETED

BACKGROUND

The UTU has filed a Formal Complaint with the Commission alleging that CP Rail has failed to provide an adequate and convenient shelter facility in the West Yard of its Bensenville, Illinois rail-switching yard. See Formal Complaint, at 1. Specifically, the UTU alleges that CP Rail's removal of a building seven years ago and CP Rail's removal of a trailer in August 2004 have deprived engineers and switchmen who work in the West Yard of a shelter facility, including restrooms and break areas. Complaint ¶ 3.8. The UTU claims that these actions violate several ICC regulations which relate to the provision, construction and maintenance of shelter facilities for rail carrier employees, namely: 1) 1545.110 and 1545.120 of the Illinois Administrative Code, which relate to a railroad's provision and regulation of toilet and washing facilities; 2) 1545.200 which relates to the provision of a shelter where "it is requested by an employee" who "works regularly at a location (other than a repair track) where shelter is not otherwise available," and shelter is "deemed necessary by the Commission"; and 3) 1545.210 which relates to the provision and regulation of lunch rooms. For relief, the UTU seeks an order requiring CP Rail to provide a shelter facility for West Yard employees and that "plans for said shelter facility" be reviewed and approved by the Commission prior to the "construction" of such shelter facility. Id.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE ICCTA PREEMPTS THE ICC REGULATIONS RELIED UPON BY THE UTU IN ITS COMPLAINT

The remedies with respect to regulation of rail transportation provided under ICCTA are "*exclusive and preempt the remedies provided under Federal or State law.*" 49 U.S.C. §

10501(b) (emphasis added). ICCTA Section 10501(b) likewise grants to the STB **exclusive** jurisdiction over--

- (1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchanges and other operating rules), practices, routes, services *and facilities of such carriers*; and
- (2) the *construction, acquisition, operation, abandonment, or discontinuance* of spur, industrial, team, switching, or side tracks, or *facilities*, even if the tracks are located, or intended to be located, entirely in one State,

49 U.S.C. § 10501. Emphasis added. Finally, the term “transportation” is broadly defined to include:

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).¹

Here, the Commission lacks jurisdiction over the Complaint because the ICC regulations under which the UTU has lodged its Complaint relate to the “regulation of

¹ Courts interpret ICCTA’s preemption clause broadly. Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1294-96 (D. Mont. 1997) (ICCTA’s preemption provisions show an intent to occupy the entire field of regulation). State statutes and state administrative regulations that attempt to regulate railroad operations are repeatedly recognized to be preempted by ICCTA. See Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 444 (5th Cir. 2001) (state anti-blocking statute is preempted by ICCTA); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (ICCTA preempts state and local environmental review laws as applied to reopening of rail line); Burlington Northern R.R. Co. v. Page Grain Co., 545 N.W.2d 749, 750 (Neb. 1996) (holding that court lacks jurisdiction to review a Commission’s grant of a railroad’s application to discontinue a particular service agency because ICCTA “preempts state remedies and vests exclusive jurisdiction in the federal government for interstate rail matters affecting practices, routes, services and facilities of rail carriers”); Wisconsin Central v. City of Marshfield, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (ICCTA preempts defendant’s efforts under Wisconsin law to condemn property used in rail transportation). Indeed, as one court has stated, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than Congress provided in 49 U.S.C. § 10501(b)). CSX Transp., Inc. v. Georgia Public Serv. Comm’n, 994 F. Supp. 1573, 1581 (N.D. Ga. 1996).

rail transportation” and are therefore preempted by the exclusive jurisdiction clause under ICCTA. First, the allegations of the Complaint are about the condition, existence, (or alleged lack thereof) of *facilities* in the Bensenville rail yard. ICCTA vests ***exclusive jurisdiction*** in the STB over matters relating to “transportation by rail carriers,” and “the remedies provided in this part with respect to . . . *facilities* of such carriers.” Transportation is broadly defined to include a yard, property, *facility*, or equipment of any kind related to the movement of property, . . . and services related to that movement.”

Moreover, the STB has ***exclusive jurisdiction*** over the “construction, operation, abandonment or discontinuance of [a rail carrier’s] . . . *facilities*.” 49 U.S.C. § 10501(b)(2). The factual allegations contained in the UTU’s Complaint and the ICC regulations upon which it relies fall squarely within this clause. The core of the UTU’s Complaint stems from CP Rail’s removal of a trailer from the West Yard in August 2004. This claim expressly relates to the “abandonment or discontinuance” of a CP Rail “facility” and falls within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b)(2). As a remedy, the UTU seeks an order from the Commission that would require CP Rail to “construct” another shelter facility. See Complaint. Likewise, ICCTA’s exclusive jurisdiction clause preempts claims relating to the “construction” of a rail carrier’s facilities. See 49 U.S.C. § 10501(b) (conferring exclusive jurisdiction in the STB over the “construction” of a rail carrier’s “facilities”). The issues presented by the UTU’s Complaint fall solely and completely under the exclusive jurisdiction of the STB because the ICC regulations are preempted by the broad and unambiguous language of ICCTA. The Complaint should be dismissed for lack of jurisdiction.

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE CLAIMS ASSERTED BY THE UTU CONSTITUTE A MINOR DISPUTE AND THEREFORE ARE PREEMPTED BY THE RAILWAY LABOR ACT

The Complaint should be dismissed because, to the extent the claims asserted by the UTU involve labor relations, such claims constitute “minor disputes” and therefore are subject to the exclusive jurisdiction of the Railway labor Act (“RLA”). “[T]he RLA provides a comprehensive framework for resolving labor disputes, including a mandatory arbitral mechanism for the prompt and orderly settlement of two classes of disputes”—major and minor disputes. Monroe v. Missouri Pacific Railroad Co., 115 F.3d 514, 516 (7th Cir. 1997). “Major disputes relate to the formation of collective bargaining agreements or efforts to secure them.” Brown v. Illinois Cent. R.R. Co., 254 F.3d 654, 658 (7th Cir. 2001). “Minor disputes” arise “out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.” Id. (quoting 45 U.S.C. § 151a; Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, at 252-54 (1994)).

“A plaintiff’s claim is properly characterized as a minor dispute (and is therefore subject to mandatory and exclusive arbitration under the RLA) when the resolution of the plaintiff’s claim requires interpretation of the CBA.” Brown, 254 F.3d at 658. Additionally, “[a] ‘plaintiff’s claims are minor disputes if they depend not only on a right found in the CBA, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working relationship.” Monroe, 115 F.3d at 518 (quoting Fry v. Airline Pilots Ass’n, Int’l, 88 F.3d 831, 836 (10th Cir. 1996)).

Under the RLA’s “comprehensive framework,” the UTU’s state law claims are “minor disputes” because they implicate contractual rights and “practices, procedures,

implied authority, or codes of conduct that are part of the working relationship.” Monroe, 115 F.3d at 518. The collective bargaining agreement between the UTU and CP Rail, which governs the working relationship of UTU members, contains express provisions relating to CP Rail’s provision and maintenance of the types of facilities at issue here. See UTU Agreement at Exhibit A. Article 40 of the UTU Agreement provides that “[e]mployees will be furnished locker and washrooms with proper sanitary facilities at terminals reasonably convenient to the port where they go on and off duty. The same will be kept in a sanitary condition.” Id. The Agreement further provides for a complaint and resolution process in the event of a dispute relating to such facilities:

In the event that some problem with respect to locker rooms, washrooms or toilet facilities is brought to the Company’s attention, and is not adequately addressed by the local Company Officer, joint inspection will be arranged between the Manager of Road or Yard Operations responsible for that location and the Local Chairman upon request to determine if corrections in complained-of conditions are necessary.

Id., Art. 40(f). Accordingly, the UTU’s claims arise from the interpretation and application of the UTU Agreement and the RLA preempts such claims as a minor dispute subject to the exclusive arbitral mechanism of that Act. Courts have dismissed state law claims as preempted by the RLA where, as here, such claims arise out of employees’ working conditions and implicate the terms of that employee’s collective bargaining agreement. See Calvert v. Trans World Airlines, 959 F.2d 698, 699-700 (8th Cir. 1992) (affirming district court’s dismissal of state law claims on RLA preemption grounds because plaintiff’s claims related to his working conditions and thus implicated the terms of the governing collective bargaining agreement); Leu v. Norfolk & Western

R.R. Co., 820 F.2d 825 (7th Cir. 1987) (state law claims preempted by RLA); Brown, 254 F.3d at 658.²

III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE CLAIMS ARE MOOT

The Complaint should also be dismissed as moot. In its Complaint, the UTU alleges that CP Rail has failed to provide adequate toilet, washing or shelter facilities. The allegations in the Complaint relate back to informal complaints and inspections that occurred in the Spring and Summer of 2004. Since that time, CP Rail has made a number of changes relating to the alleged facilities deficiencies, including ensuring that locomotives used in the West Yard have properly functioning toilet facilities, water and crew packs and installing a bungalow on the West Yard to house additional water and crew packs for employees who work in that area. See Affidavit of Deborah Balthazar, ¶2. Accordingly, any concerns raised by the Complaint are moot.

CONCLUSION

For all the foregoing reasons, CP Railway respectfully requests that the Commission grant its Motion to Dismiss and dismiss the Complaint in its entirety.

Dated: Dec 29, 2004

DALEY & MOHAN, P.C.

By: 

Daniel J. Mohan, # 365641
150 North Wacker Drive
Suite 1550

² The Federal Rail Safety Act may also divest the Commission of subject matter jurisdiction. In its Complaint, the UTU alleges that CP Rail's removal of the trailer in the West Yard deprives employees working in that area of a restroom and lunch room/break room "for their *safety*, comfort and convenience." Complaint ¶8. Under the Federal Rail Safety Rail Act, federal law preempts state laws and regulations related to railroad safety, except in certain limited circumstances. 49 U.S.C. § 20106.

Chicago, IL 60606

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**ATTORNEYS FOR CANADIAN
PACIFIC RAILWAY**



GENERAL LABOR AGREEMENT

BY AND BETWEEN

THE UNITED TRANSPORTATION UNION

AND THE

SOO LINE RAILROAD COMPANY

(A Wholly Owned Subsidiary of Canadian Pacific Railway)

Q: When is the beginning and ending time of vacation taken in less than full week increments?

A: The vacation period begins at 12:01 a.m., on the first day of the vacation and ends at 11:59 p.m., that day or the last day of the vacation period.

Q: When an employee elects to observe one (1) week of vacation in single day increments as provided for in paragraph (d) does that constitute one (1) of the allowable splits in his/her annual vacation as provided for in paragraph (a)?

A: Yes.

Q: Can the employee elect to take vacation in periods of two (2), three (3), or four (4) days, rather than a single day increments?

A: Yes, the employees should follow the established procedure for assigning vacations on the property.

Q: If an employee observes a single day of vacation and subsequently becomes ill so as to be unable to work the next day, what must he/she do inasmuch as they are to mark-up for service automatically?

A: The employee should follow the established procedure for marking off sick?

Q: Are an employee's obligations under the existing rules and practices with the respect to protecting service on his/her assigned off/rest days changed if the employee observes a single day of vacation immediately prior to such off/rest days?

A: No.

Q: May an employee request a single day of vacation to be taken immediately following a day where he/she was off sick or observing a personal leave day?

A: Yes.

ARTICLE 40 - WELFARE-LOCKER ROOM FACILITIES

- (a) Employees will be furnished locker and washrooms with proper sanitary facilities at terminals reasonably convenient to the point where they go on and off duty. The same will be kept in a sanitary condition.

- (b) Facilities will be provided at other points where employees go on duty or off duty consistent with conditions at those points.
- (c) With reference regarding locker, washroom and toilet facilities it will be the policy of the Company as to constructing the locker room and washroom facilities to follow the provisions of the State Administrative Code in all states through which they operate.
- (d) As to existing facilities, it is the intention of the Company to maintain them in a reasonable manner in the belief that with the cooperation of the employees using the facilities, good housekeeping practices will prevail.
- (e) The Company will provide signs at appropriate locations urging the cooperation of the employees to keep the facilities clean and to use the receptacles provided therein for trash and other refuse.
- (f) In the event that some problem with respect to locker rooms, washrooms or toilet facilities is brought to the Company's attention, and is not adequately addressed by the local Company Officer, joint inspection will be arranged between the Manager of Road or Yard Operations responsible for that location and the Local Chairman upon request to determine if corrections in complained-of conditions are necessary.

ARTICLE 41 - WORK TRAIN SERVICE WITHIN SWITCHING LIMITS

(See Article 125)

ARTICLE 42 - YARD AND TRACK CONDITIONS

- (a) All yard tracks and trackage in road territory will be cleaned as necessary twice each year. Safety hazards will be removed or corrected.
- (b) Professional pest control programs will be used when necessary.
- (c) The growth of weeds and vegetation immediately adjacent to the Company's tracks will be retarded to the fullest extent necessary to enhance the safety of employees.
- (d) Switching leads will be salted or sanded, as necessary, during the winter season.
- (e) Switches will be cleaned, oiled and serviced as necessary. Train service and yard service employees will not be required to clean switches for other than their own use. Proper cleaning equipment will be made available.

IN THE ILLINOIS COMMERCE COMMISSION

United Transportation Union-
Illinois Legislative Board,

Case No. T04-0082

Petitioner,

**AFFIDAVIT OF
DEBORAH BALTHAZAR**

v.

Canadian Pacific Railway,

Respondent.

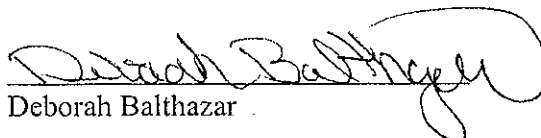
STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Deborah Balthazar, being first duly sworn upon oath deposes and states as follows:

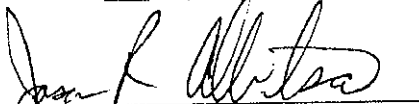
1. My name is Deborah Balthazar. I am currently the Manager of Facilities for Canadian Pacific Railway. I have worked at Canadian Pacific Railway since April 19, 1993. I submit this Affidavit in Support of CP Rail's Motion to Dismiss.

2. CP Rail has made a number of changes in the West Yard, including ensuring that locomotives used in the West Yard have properly functioning toilet facilities, water and crew packs. In the Fall of 2004, CP Rail also installed a bungalow on the West Yard to house additional water and crew packs for employees who work in that area.

FURTHER YOUR AFFIANT SAYETH NOT.


Deborah Balthazar

Subscribed and sworn to before
me this 29th day of December, 2004.


NOTARY PUBLIC

